Prosecutor v. Karemera, Ngirumpatse, & Nzirorera. Case no. ICTR-98-44-AR73(C). Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice

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pleadings (all available online)—will undoubtedly invite scholarly analysis and serve to guide judges, counsel, legal advisers, and other practitioners in the application and implementation of the LOS Convention as a part of the global system of peace and security in the decades to come.

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International Criminal Tribunal for Rwanda—genocide—conspiracy to commit genocide—complicity in genocide—mens rea—judicial notice.

PROSECUTOR V. KAREMERA, NGIRUMPATSE, & NZIRORERA. Case No. ICTR-98-44-AR73(C). Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice. *At* <http://www.ictr.org>. International Criminal Tribunal for Rwanda, Appeals Chamber, June 16, 2006.

In an interlocutory appeal in *Prosecutor v. Karemera*,[1] the appeals chamber of the International Criminal Tribunal for Rwanda (ICTR) held that the commission of genocide against the Tutsis in 1994 is a "fact of common knowledge" of which trial chambers must take judicial notice (Appeals Decision, paras. 35, 38). The decision represents a significant reversal in ICTR practice: although some trial chambers have been willing to take notice of "widespread and systematic attacks" against Tutsis in Rwanda,[2] they have uniformly insisted that the question of whether the attacks amounted to genocide is so fundamental that formal proof is required.[3]

As noted in the indictment,[4] Edouard Karemera and Jospeh Nzirorera were minister-level officials in the Rwanda' interim government (Indictment, paras. 1, 3) and served, along with Mathieu Ngirumpatse, as the national executive leadership of the National Republican Movement for Democracy and Development (MRND) (*id.*, para. 9). They are charged with, inter alia, conspiracy to commit genocide, direct and public incitement to commit genocide, genocide, and—alternatively—complicity in genocide (*id.*). The prosecution alleges that they created, recruited, and organized the *Interahamwe*, the vicious youth wing of the MRND; provided members of the *Interahamwe* with weapons and military training; and helped formulate and implement policies of the interim government of April 8, 1994, that were intended to incite, encourage, and abet killings of Tutsis (*id.*, para. 14).

Prior to trial, which began on September 19, 2005, the prosecution requested that the trial chamber take judicial notice of six "facts of common knowledge" (Appeals Decision, para. 2). Fact 6 stated that "[b]etween 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group" (Indictment, para. 33). According to Rule 94(A) of the ICTR

[1] Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, para. 38 (June 16, 2006) [hereinafter *Karemera* Appeals Decision]. The cases, basic legal texts, press releases, and other materials of the International Criminal Tribunal for Rwanda are available at <http://www.ictr.org>.

[2] *See, e.g.,*. Prosecutor v. Semanza, Case No. ICTR-97-20-I, Decision on Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, para. 29 (Nov. 3, 2000). *But see* Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, para. 19 (Dec. 1, 2003).

[3] *See, e.g.,* Prosecutor v. Semanza, para. 36.

[4] Amended Indictment, paras. 1, 3 (Feb. 23, 2005), Prosecutor v. Karemera, Case No ICTR-98-44-I.

Rules of Procedure and Evidence, "A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof."[5]

Without addressing the issue of whether Fact 6 was common knowledge, the trial chamber denied the prosecution's request. First, it held that Fact 6 was irrelevant because the existence of a nationwide campaign of genocide in Rwanda was "not a fact to be proved" in any of the charges against the defendants.[6] Second, it held that, because the prosecution alleged that the defendants were responsible for crimes that occurred throughout Rwanda, taking judicial notice of Fact 6 would reduce the prosecution's burden of proof in the case.[7]

On interlocutory appeal by the prosecution, the appeals chamber held that the trial chamber erred in refusing to take judicial notice of Fact 6 under Rule 94(A) (Appeals Decision, para. 38). After noting that a fact qualifies as common knowledge if it is "not reasonably subject to dispute" (*id.*, para 22),[8] it concluded that the occurrence of genocide in Rwanda in 1994 is such a fact, given the "countless books, scholarly articles, media reports, U.N. reports and resolutions, national court decisions, and government and [nongovernmental organization] reports" that have documented the atrocities (*id.*, para 35, footnotes omitted). In reaching that conclusion, the appeals chamber rejected the defendants' argument that Rule 94(A) does not allow a trial chamber to take judicial notice of facts that are legal in nature (*id.*, para. 37); it noted that the term "genocide" is no different than other legal terms used to characterize factual situations—such as "widespread or systematic"—whose judicial notice it had previously approved (*id.*). Rule 94(A), in the appeals chamber's view, asks only whether the fact in question can be reasonably disputed; whether it is described in "legal or laymen's terms" is of no concern (*id.*, para. 29).

Having established that Fact 6 qualified for judicial notice under Rule 94(A), the appeals chamber then rejected both of the trial chamber's rationales for refusing to take notice of it, which it described as "oddly contradictory" (Appeals Decision, para. 36). The relevance rationale, the appeals chamber held, could be "readily dismissed" (*id.*):

> Whether genocide occurred in Rwanda is of obvious relevance to the Prosecution's case; it is a necessary, although not sufficient, part of that case. Plainly, in order to convict an individual of genocide a Trial Chamber must collect evidence of that individual's acts and intent. But the fact of the nationwide campaign is relevant; it provides the context for understanding the individual's actions. (*Id.*)

The appeals chamber was no more convinced by the trial chamber's burden of proof rationale. In its view, taking judicial notice of a nationwide campaign of genocide in Rwanda will not lessen the prosecution's burden of proof in the case. "Rather, it provides an alternative way that that burden can be satisfied, obviating the necessity to introduce evidence documenting what is already common knowledge" (Appeals Decision, para. 37). The prosecution must still

[5] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, as amended, UN Doc. ITR/3/Rev.11, Rule 94(A) (2001).

[6] *See* Prosecutor v. Karemera, Case No ICTR-98-44-R94, Decision on Prosecution Motion for Judicial Notice, para. 7 (Nov. 9, 2005).

[7] *Id.*, para. 7.

[8] Citing *Prosecutor v. Semanza,* para. 194.

"introduce evidence demonstrating that the specific events alleged in the Indictment constituted genocide and that the conduct and mental state of the Accused specifically make them culpable for genocide" (*id.*).

* * * *

The Office of the Prosecutor hailed *Karemera* as a "landmark decision" that will "silence the 'rejectionist' camp which has been disputing the occurrence of genocide" in Rwanda.[9] Whether that prediction will prove true remains to be seen. Nevertheless, there is no question that Rwandans have welcomed the ICTR's formal—if belated—recognition that the 1994 atrocities represented a nationwide campaign of genocide, not simply a series of individual genocidal acts.[10]

From the standpoint of substantive international criminal law, however, the *Karemera* decision is troubling. To begin with, the appeals chamber provides only the most cursory explanation of why the existence of a nationwide campaign of genocide is relevant to the defendants' responsibility for specific genocidal acts. The appeals chamber's relevance argument involves two interrelated claims: that proof of a nationwide campaign is "a necessary, although not sufficient, part" of the prosecution's case; and that such proof "provides the context for understanding the individual's actions." Neither claim is persuasive.

The first claim, if taken literally, is simply incorrect: regardless of whether a defendant is accused of genocide, conspiracy to commit genocide, or complicity in genocide, the occurrence of a nationwide genocidal campaign is not a necessary element of the crime.[11] Consider, for example, a defendant charged with direct participation in genocide. Proof of such participation involves three elements: (1) the defendant committed the *actus reus* of the crime, such as killing or causing serious bodily harm; (2) the victims of the crime were members of a national, ethnical, racial, or religious group; and (3) the defendant acted with the necessary mens rea—the specific intent to destroy the national, ethnical, racial, or religious group as such.[12] The existence of a nationwide campaign of genocide does not "tend to prove" any of those elements, as Rule 89(C)'s relevance test requires. The fact that individuals were killed on a nationwide scale does not make it more likely that the defendant killed one of them. The fact that the victims of the nationwide killings were members of a protected group does not make it more likely that the defendant's alleged victims were also members of that group. And the fact that other unnamed individuals specifically intended to destroy a protected group does not make it more likely that the defendant harbored the same specific intent.[13]

[9] ICTR Press Release ICTR/INFO-9-2-481.EN, ICTR Takes Judicial Notice of Genocide in Rwanda (June 20, 2006).

[10] *See* Felly Kimenyi, "ICTR Finally Recognizes 1994 Rwanda Genocide," NEW TIMES (June 22, 2006), *at* <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2006/0622recognizes.htm>.

[11] *See, e.g.,* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, para. 223 (Apr. 19, 2004) ("The offence of genocide, as defined in the Statute . . . , does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against civilian population.").

[12] *See* Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, Art. 2 (Nov. 8, 1994), 33 ILM 1602 (1994).

[13] *See* JOHN QUIGLEY, THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS 118 (2006) ("Even though others may have been acting to destroy a given group, the specific accused person may have been acting outside that context, pursuing wholly different objectives.").

The irrelevance of the nationwide campaign is most evident with respect to direct participation in genocide, which does not formally require proof of the actions of others;[14] as the trial chamber held in *Kayishema*, a lone individual can theoretically commit genocide.[15] The result is the same, however, for indirect forms of participation that necessarily require the prosecution to prove the actions of at least one person other than the defendant, such as conspiracy to commit genocide, complicity, or superior responsibility. An individual cannot be convicted of aiding and abetting genocide, for example, unless *someone* has committed a predicate genocidal act.[16] Even here, however, the existence of the nationwide campaign of genocide is irrelevant to the defendant's criminal responsibility: although the principal perpetrator does not have to be specified by name,[17] the prosecution must still identify and prove the particular genocidal acts that the defendant allegedly aided and abetted. As the trial chamber said in *Prosecutor v. Ntagerura*:

> The Chamber emphasises . . . that the accused must be informed not only of his own alleged conduct giving rise to criminal responsibility but also of the acts and crimes of his alleged . . . accomplices. Thus, pleading accomplice . . . responsibility does not obviate the Prosecution's obligation to particularise the underlying criminal events for which it seeks to hold the accused responsible . . . .[18]

Judicial notice of the nationwide campaign of genocide in Rwanda is not an adequate substitute for such particularization; a defendant cannot be convicted of aiding and abetting a nationwide campaign. To satisfy Rule 89(C)'s relevance requirement, a trial chamber would have to take judicial notice of a far more specific genocidal campaign—such as the mass killings in Bisesero, an area of Rwanda that spanned the Gishyita and Gisovu communes[19]—that Gerard Ntakirutimana aided and abetted.[20] Not even *Karemera*, however, suggests that subnational genocides are "facts of common knowledge" within the meaning of Rule 94(A).[21]

In most aiding and abetting cases, of course, the prosecution will have particularized evidence of the "acts and crimes" of the defendant's accomplices. In such cases, of which *Karemera* itself is an example (Indictment, paras. 62–66), judicial notice of the nationwide campaign of genocide would *supplement*, not replace, that evidence. But then the nationwide campaign would have no probative value: the fact that unnamed individuals committed genocide throughout Rwanda would not "tend to prove" that the defendant aided and abetted the specific genocidal acts identified in the indictment.

We are left, then, with the appeals chamber's second claim: that the nationwide campaign of genocide is relevant because it provides a "context" for understanding the defendant's allegedly genocidal actions (Appeals Decision, para. 36). Like trial chambers that have made similar

[14] *See, e.g.*, Prosecutor v. Kupreskić, Case No. IT-95-16-A, Judgment, para. 89 (Oct. 23, 2001).

[15] *See, e.g.*, Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgment (Reasons), para. 84 (June 1, 2001).

[16] *See* Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, para. 638 (Jan. 17, 2005).

[17] *See, e.g.*, Prosecutor v. Krstić, para. 143.

[18] Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgment, para. 35 (Feb. 24, 2005).

[19] Amended Indictment [Bisesero] (July 7, 1998), para. 4.11, Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10 & ICTR-96-17.

[20] Prosecutor v. Ntakirutimana, Case No. ICTR-96-10-A, Judgment, para. 509 (Dec. 13, 2004).

[21] There is no reason to believe, however, that the appeals chamber would not hold exactly that in the right situation. A number of more specific genocides in Rwanda seem equally indisputable, such as the notorious atrocities committed in the Taba commune. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, paras. 167–71.

pronouncements,[22] the appeals chamber never explains what that bare assertion actually means. The most obvious interpretation is also the least acceptable—namely, that the existence of the nationwide campaign counsels skepticism toward defendants' claims that they did not commit genocide. That argument is fundamentally inconsistent with the presumption of innocence[23] because it assumes *ex ante* that a defendant charged with genocide in a climate of genocidal acts is more likely to be guilty than a defendant charged with the same crime in a climate that is not genocidal.

Another possible interpretation of the appeals chamber's "context" claim is that indirect forms of participation in genocide should be taken especially seriously because the existence of a nationwide campaign of genocide demonstrates that there are a significant number of genocidal acts for which the defendant could be responsible. Although that idea has some intuitive appeal, it does not suffice to make the nationwide campaign relevant. For the reasons explained above, the prosecution is still obligated to identify and prove the *specific* genocidal acts at issue in the defendant's case.

Neither of the appeals chamber's claims regarding the relevance of the nationwide campaign, then, is ultimately convincing. Moreover, even if we assume that the nationwide campaign *is* somehow relevant, the probative value of the campaign as "context" is almost certainly outweighed by its possibility of prejudice, an independent ground for its exclusion.[24] As the appeals chamber recognizes, taking judicial notice of the nationwide campaign of genocide does not affect the prosecution's obligation to prove that the defendant acted with the specific intent necessary for the crime (Appeals Decision, para. 37). The problem with *Karemera*, however, is that the trial chamber held in *Akayesu*—a holding consistently cited with approval by the ICTR[25]—that the defendant's specific intent *can be inferred from the actions of others*: "The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others."[26] Such an inference may be warranted in conspiracy cases, where the fact that the defendant's co-conspirators acted with specific intent would "tend to prove" that the defendant also acted with that intent.[27] But *Akayesu* is not limited to such cases; on the contrary, the decision says that the defendant's specific intent can be inferred from proof of the nationwide genocidal campaign itself.[28] Although that inference is questionable,[29] at least *Akayesu* required the

[22] *See, e.g.,* Prosecutor v. Kayishema, para. 273 (noting, without explanation, that the nationwide campaign is a question "of general importance" in a genocide case).

[23] *See, e.g.,* Prosecutor v. Akayesu, para. 129.

[24] *See* Prosecutor v. Bagasora, Case Nos. ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, para. 16 (Dec. 19, 2003).

[25] *See, e.g.,* Prosecutor v. Kajelijeli Case No. ICTR-98-44A-T, Judgment and Sentence, para. 804 (Dec. 1, 2003) (approving *Akayesu*).

[26] Prosecutor v. Akayesu, para. 523.

[27] Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, para. 40 (Mar. 22, 2006) (noting that it is permissible to consider "whether the apparent intentions of others . . . could provide indirect evidence of the Appellant's own intentions *when he agreed with those others to undertake criminal plans*" (emphasis added)).

[28] Prosecutor v. Akayesu, para. 730 ("Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, . . . the Chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes.").

[29] *See supra note 13 and* accompanying text.

prosecution to *prove* that the nationwide campaign actually took place, a process that necessarily involved evidence of specific genocidal acts committed by specific perpetrators.[30] Now, because of *Karemera*, not even that proof is required; the trial chamber will simply assume the occurrence of the nationwide campaign. *Karemera* and *Akayesu* thus form a potentially lethal pair: the prosecution can request that a trial chamber take judicial notice of the nationwide campaign of genocide, and it can then argue that the chamber should infer the defendant's specific intent from that campaign. If the trial chamber agrees, the prosecution will have "proved" the defendant's specific intent without introducing *any* evidence of that intent at all—an unacceptably prejudicial result.

That danger will exist, moreover, regardless of whether a defendant is charged with direct or indirect participation in genocide. The prejudicial value of taking judicial notice of the nationwide campaign would seem to be at a minimum when a defendant is charged with direct participation, because the prosecution will still have to prove that the defendant committed an act that satisfies the *actus reus* of the crime. *Karemera* can be problematic even here, however, if the *actus reus* does not clearly support an inference of specific intent—a murder, for example, that may or may not have been part of the nationwide genocidal campaign. In such an ambiguous situation, judicial notice of the campaign could mean the difference between conviction and acquittal.

A similar—and perhaps even greater—danger will exist when a defendant is charged with indirect participation in genocide, such as joint criminal enterprise (JCE). To convict a defendant of JCE complicity, the prosecution must prove that (1) there was a common plan to commit genocide, (2) the defendant participated in the common plan by assisting, encouraging, or lending moral support to it, and (3) the defendant intended to further the common plan through his actions.[31] *Karemera* will require trial chambers to take judicial notice of the first element, in the form of a nationwide "common plan" to commit genocide; the appeals chamber has already held that "liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a 'nation wide government-organized system of cruelty and injustice.'"[32] The only live question will be whether the defendant participated in the nationwide common plan with the intent to further it. And that is where *Akayesu* comes in: if a trial chamber can infer a defendant's specific intent to commit genocide solely from the existence of a nationwide campaign of genocide, it can certainly use even the most ambiguous act of "assistance, encouragement, or moral support" to infer a defendant's membership in, and support for, that campaign. The result would be a highly questionable conviction.

As this discussion indicates, the appeals chamber's decision in *Karemera* dramatically expands the use of judicial notice in genocide cases. That expansion is unwarranted: although the occurrence of a nationwide campaign of genocide in Rwanda may be beyond reasonable dispute, judicial notice of that campaign has no place in a trial whose purpose is to establish the guilt or innocence of an individual defendant. No matter how important silencing the

[30] Prosecutor v. Akayesu, paras. 112–29 (detailing evidence of the nationwide campaign).

[31] Prosecutor v. Tadić, No. IT-94-1-A, Judgment, paras. 227–28 (July 15, 1999).

[32] Rwamakuba v. Prosecutor, Case No. ICTR-98-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, para. 25 (Oct. 22, 2004).

"rejectionist" camp may be, it cannot take precedence over the right of every defendant, even one accused of the "crime of crimes,"[33] to a fair trial.

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Cooperation with international tribunals—binding orders directed at states and international organizations—intelligence information—national security interests—disclosure to defendants—fair trials

PROSECUTOR V. MILUTINOVIĆ ET AL., Case No. IT-05-87-AR108*bis*.2, Decision on Request of the United States of America for Review.

PROSECUTOR V. MILUTINOVIĆ ET AL., Case No. IT-05-87-AR108*bis*.1, Decision on Request of the North Atlantic Treaty Organisation for Review.
International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, May 12 and May 15, 2006, respectively.

In May 2006, the appeals chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) granted the requests of the United States (U.S. Review Decision) and the North Atlantic Treaty Organization (NATO) (NATO Review Decision) and set aside the trial chamber's decision ordering the production of intercepted communications sought by defendant Dragoljub Ojdanić.[1] The appeals chamber held that Rule 54*bis* of the ICTY Rules of Procedure and Evidence does not require the possessor of intelligence information to produce that information when that state or international organization is not its owner or originator and that an order under Rule 54*bis* ("Orders Directed to States for the Production of Documents") will not issue when a party refuses a state's cooperative efforts to provide information pursuant to Rule 70 ("Matters Not Subject to Disclosure").

Ojdanić was appointed chief of the General Staff of the Army of the Federal Republic of Yugoslavia (FRY) on November 24, 1998. Together with six others[2]—high-ranking FRY and Serbian political, military, and police officials—Ojdanić, who later became FRY defense minister, is accused of participating in a joint criminal enterprise, beginning in October 1998, the purpose of which was "the modification of the ethnic balance in Kosovo in order to ensure continued Serbian control over the province."[3] According to the indictment,[4] "This purpose was to be achieved by criminal means consisting of a widespread or systematic campaign of terror

[33] Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, para. 16 (Sept. 4, 1998).

[1] Prosecutor v. Milutinović, Case No. IT-05-87-AR108*bis*.1, Decision on Request of the North Atlantic Treaty Organisation for Review (May 15, 2006) (on file with author) [hereinafter NATO Review Decision]; Prosecutor v. Milutinović, Case No. IT-05-87-AR108*bis*.2, Decision on Request of the United States of America for Review (May 12, 2006) (on file with author) [hereinafter U.S. Review Decision]. Except as noted, the ICTY materials cited in this case report are available on the Tribunal's Web site, <http://www.un.org/icty/>.

[2] Also charged are Milan Milutinović, Nikola Šainović, Nebojša Pavković, Vladimir Lazarević, Vlastimir Djordjević, and Sreten Lukić.

[3] [Redacted] Third Amended Joinder Indictment, para. 19 (June 21, 2006), Prosecutor v. Milutinović, Case No. IT-05-87-PT [hereinafter Indictment].

[4] Ojdanić was initially charged in an indictment (Case No. IT-99-37), confirmed on May 24, 1999, that included Slobodan Milošević, Milutinović, Šainović, and Vlajko Stojiljković. That indictment was thrice amended—including, in its last iteration, the removal of defendants Milošević (for trial separately) and Stojiljković (who had died)—and restyled *Prosecutor v. Milutinović*. On motion of the Office of the Prosecutor, granted on July 8, 2005, the *Milutinović* case was joined with the case against Pavković, Lazarević, Djordjević, and Lukić (Case No. IT-03-70). The